

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

NCRNC, LLC D/B/A NORTHEAST CENTER
FOR REHABILITATION AND BRAIN INJURY

Cases 03-CA-252090
03-CA-254186

and

1199SEIU UNITED HEALTHCARE WORKERS
EAST

Case 03-CA-255155

and

TARA GOLDEN, AN INDIVIDUAL

**NCRNC, LLC D/B/A NORTHEAST CENTER FOR REHABILITATION
AND BRAIN INJURY POST-HEARING BRIEF**

Hinman, Howard & Kattell, LLP
Dawn J. Lanouette, Esq.
*Attorneys for NCRNC, LLC d/b/a
Northeast Center for Rehabilitation and
Brain Injury*
80 Exchange Street
PO Box 5250
Binghamton, NY 13902-5250
(607) 231-6917
dlanouette@hhk.com

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PRELIMINARY STATEMENT

General Counsel brought this complaint against NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury (“Northeast Center” or “facility”) alleging it committed unfair labor practices when it created the impression of surveillance (Compl. 6b, 6g), threatened employees regarding perceived union activity (Compl. 6c, 6f, 6h, 6j) interrogated employees about union activities of other employees (6e, 6i), and blamed the Union for a lack of raises (6k).¹ General Counsel also alleges that Northeast Center violated the Act when it suspended and discharged three individuals (Golden, Endy, and Todd). Compl. 7, 8.

In fact, the evidence shows that Northeast Center made significant effort to ensure its supervisors behaved lawfully during the campaign, and that many of the events the General Counsel raises were in no way related to union activity. The Complaint should be dismissed.

FINDINGS OF FACT

Northeast Center

Northeast Center is a specialty rehabilitation and long-term care center focused on individuals with traumatic brain injuries. Most of the patients, known at the facility as “Neighbors”,² suffer from cognitive impairment. That is, they have problems with attention and concentration, mood regulation and impulse control, processing and understanding information, and self-awareness and judgment, among other issues. T. 272. Because of their brain injuries, patients sometimes engage in “behaviors” such as throwing things, physical and verbal aggression, or acting out in inappropriate ways. T. 31. The patients are not compelled to be at the facility; however, some of the patients have guardians appointed for them because they are

¹ The General Counsel withdrew paragraph 6(a).

² For clarity, Respondent has referred to them as “patients” or “residents” in this memorandum of law. In documentation, they are typically referred to as “Neighbors.”

deemed incompetent, and the guardians have compelled them to be in the facility because of the patient care provided. T. 360.

Patients at Northeast Center live in “Units.” The Neuro Behavioral Unit (NBI) is a 20 bed behavioral lock down unit. T. 25-26; 275; 358. The NBI Unit is governed by the NBI Policy that is required by New York State regulations. T. 360-62; R-30. Patients on the NBI Unit are a danger to themselves or others. Patients are placed on the NBI Unit for closer supervision and monitoring. T. 358. Services, such as therapy and psychology, come to the patients on the unit, as the patients do not leave the unit. T. 25-26. The interdisciplinary brain injury team makes the determination on placement in the NBI Unit. T. 359.

Other Units at Northeast Center include the Ventilator Unit (Vents) and the Medically Complex Unit (“MCU”) (T. 25; 275). The remaining five units provide care to different levels of patients in the Neuro-Rehabilitative Program (NRP).

Each Unit is overseen by an LPN Unit Manager or RN Unit Manager (collectively referred to as “Unit Managers”). Each Unit is staffed with nursing department staff who report to the respective Unit Manager. T. 275.

Nursing Department

The Nursing Department has between 175 and 200 employees. T. 667. There are eight (8) Unit Managers who oversee the day-to-day operations of their Units. The Unit Managers report to the Assistant Director of Nursing (“ADON”). The ADON reports to the Director of Nursing (“DON”) who has overall responsibility for the department. T. 275.

LPNs, RNs, CNAs, TNAs and unit assistants work on the units. A TNA is a temporary nursing assistant who has not yet sat for the CNA licensing exam. T. 664. Unit Assistants cannot provide direct hands on care, but can assist other positions. T. 664. CNAs perform hands on care such as bathing, grooming, and related care. T. 664. LPNs pass medication to patients and

give patients treatment. T. 664. RNs oversee LPNs, and can also give treatments. Only RNs can assess patients or give treatments involving the central line for IV access. T. 665.

In addition to the Unit staff, there is an RN Nursing Supervisor for each shift. This is because some of the Unit Managers are LPNs and cannot perform assessments on patients following a Code, or other event requiring assessment. The Day Nursing Supervisor is responsible for medications from the pharmacy when they come to the facility, lab specimens, and attendance at Codes. The Day Nursing Supervisor will also take call outs from staff and help the scheduler get people in to cover shifts. T. 678; 275-76.

The Night RN Supervisor is responsible for the building as they are the highest ranking person in the building at night. T. 277.

CSS Department

Northeast Center has 46 employees that are employed in the Community Support Services Department (“CSS”). These employees work throughout the building, on every unit and in common areas. Their role is to provide safety and security for the neighbors and staff. T. 332; 591. CSS redirect residents away from negative behaviors, check on neighbors with behavioral concerns, sign neighbors in and out of the building, and ensure safety for neighbors and staff. T. 591.

Other Departments

Other departments include the Therapeutic Activities department which provides activities that enhance the lives of patients at Northeast Center. T. 274. The Dietary Department provides food and meal services. T. 274. The Rehabilitation Department provides physical, occupational, speech and music therapy programs. T. 274. Northeast Center also has a housekeeping department; however, that department is run by an outside contractor. T. 277.

Northeast Center in 2019

Patrick Weir became the Administrator for the Northeast Center on February 20, 2019.

T. 284. The Administrator has overall responsibility for the building. T. 284. As Weir became familiar with the facility, he had concerns regarding the DON, Kathy McCormick. Weir identified that people were afraid of the DON and that the facility was not running smoothly because of her. T. 284. Weir reported his concerns. T. 285.

Response to Rumors of Union Activity at the Facility

On July 5, 2019, a Unit Manager reported to Weir that she overheard staff on her unit discussing a union at the nurses' station. T. 285. Weir sent an email to his Regional Director Seth Rinn and the Chief Operating Officer at Upstate Services Group Dave Camerota advising that there was some discussion about a union. Weir asked whether he should educate managers on the dos and don'ts during a union campaign. T. 286. As a result of this conversation in late July, Keith Peraino was engaged by the Northeast Center to provide labor relations consulting, management evaluation and training to management employees. T. 794; T. 286-87; GC-8.

Management Evaluation

In July 2019, Periano stayed approximately five (5) days at Northeast Center. T. 830. He met with supervisors, unit managers, the directors of departments, human resources, and the Administrator. T. 796. Periano's team began with one-on-one meetings with management employees. The purpose of these meetings was to evaluate communication between the management employees and to evaluate their communication with the employees they supervised. T. 802; 294.

Periano's team also walked around building and talked to employees and observed management employees at work. T. 294.

Result of Management Evaluation

The management evaluations revealed there was a lack of trust in the DON and ineffectiveness on the part of the Director of Human Resources. T. 294; 802. In particular, Periano believed the DON should be terminated. T. 803-04. Periano recommended changes and training for the HR Department. T. 805. Ultimately, as a result of the management evaluations, in October 2019, the DON and Director of Human Resources were both terminated. T. 294-95.

Following termination of the DON, Carolyn Carchidi was promoted from ADON to Interim DON. T. 504. In the DON office, Weir and Carchidi discovered complaints by staff that had not been addressed; disciplines for staff that had not been filed with Human Resources; incident and accident reports for patients that had never been completed. 294-95; 663; 712.

Periano also recommended that management be more visible in the building. T. 295. In particular, Periano was concerned that the employees on the evening and night shift had little to no contact with the management of the facility. He recommended that managers be required to be present on the evening and night shifts. T. 805. As a result, Weir implemented a program where department heads would come during different shifts and times to walk through the building to get to know employees and be visible. T. 295.

At the time this management program was implemented, Northeast Center was also short staffed, and management employees were encouraged to pitch in and help. T. 296. Weir gave the example that he had been asked to get towels, Depends, and cream from the supply closet. T. 296. Medical Records Director and Legal Liaison Julie Cole gave the example that because she had a CNA license, she was able to get food for residents and help with care. T. 807.

Training Program

In July, Periano provided training to the management team on the National Labor Relations Act, collective bargaining, and communications. T. 794. He provided anti-harassment

training for the managers. T. 795. Because there had been some talk about union activity, Peraino also provided training to managers regarding what they could and could not say during a union organizing campaign. T. 795.

Periano covered what managers could talk about as facts, opinions and experiences. T. 795. He also covered what managers could not say or do, which included no threats, no interrogation, no promises, no spying or surveillance, and no discrimination against any employee. T. 795.

The Union Campaign

The Union filed a Petition for Election seeking a wall-to-wall unit on October 15, 2019. T. 288; Jt. Ex. 1. Once the Petition was filed, Periano and his team returned to the facility. Periano repeated the training he provided to managers and supervisors on what was acceptable during a union campaign. T. 797-798. Periano or his consulting company stayed at the facility for approximately four more weeks and then stayed in touch with the facility for another 2-3 weeks. T. 831.

During Fall training, Periano specifically told management employees not to ask employees if they were pro-union or anti-union. Management employees were told not to solicit grievances or what employees thought about the union or why they might go to the union. T. 796-97. Weir testified it was clear from the meetings that managers could not ask employees questions about the union. T. 289.

With regard to surveillance, Periano told management employees that if the union was having a meeting at a certain location, they should stay away from that location. T. 797. At one point, it was reported that the union was holding meetings at a local pizza place. Periano told management employees they should not go to the pizza place either alone or with their families. T. 799-800. When he heard a rumor that the union was meeting people at the Kwik Check Gas

Station, Periano told managers and supervisors to avoid the Kwik Check if they saw union people there or if they had reason to know they would be there. T. 801.

With regard to employees gathered in groups on work time, Periano instructed managers to ensure employees were working on work time and that people were not in a place they were not supposed to be. But if those criteria were met (such as a group in a break room), managers should not surveil the group. T. 798.

Managers and supervisors were told that employees could engage in conversations about the union, both pro-union and anti-union in the break room and the parking lot when employees were not working. T. 799.

In addition to the training, Periano held two brief daily meetings with managers and supervisors. One was held in the morning and the other in the afternoon. T. 288. During these meetings, Periano would again remind managers about what they could and could not do. T. 798. He maintained a brief synopsis of the rules on the white board in the Administrative Conference Room³ where the meetings took place. T. 798.

During some morning meetings, Periano would provide the “fact of the day” to management employees. T. 801; 288. This was a communication, typically a statement out of the *Guide to the National Labor Relations Act* from the nlrb.gov website. Managers were asked to read the statement to employees and to bring back feedback from the employees. T. 802. This feedback included any questions the employees had asked, whether the employees seemed interested in the topics, and whether they kept the flier or threw it away. T. 802. At the afternoon meetings, they would discuss how it went when they handed out the literature. T. 289.

³ The Administrative Conference Room was referred to throughout the hearing. It was used for many events including parties, family member meetings, lunches, and education programs. All employees have access to the administrative conference room. T. 882-83.

Tara Golden

In October 2018, Tara Golden was promoted from floor nurse to the position of RN Unit Manager for NBI. T. 25; 364; R-31. Golden's pay was increased and she was made a salaried employee. T. 102. Golden was a Registered Nurse, and as such was not eligible for membership in the unit petitioned for by the union. Jt. Ex. 1. Golden was also a supervisory employee and a management employee.

Role of the Unit Manager

The Unit Manager is responsible for the overall operation of their unit. The Unit Manager is responsible to oversee all staff on his or her unit. Unit Managers hire and discipline employees. They ensure charts are complete and care plans are complete. T. 665; 502; 541; R-24; T. 545-46. Golden testified she was responsible to keep day to day dealings on the unit going smoothly. T. 28.

When Carchidi became the Interim DON, she held a meeting with Unit Managers to tell them that she would not have regular involvement in discipline going forward. It was the responsibility of the Unit Managers. Carchidi told the Unit Managers that they were responsible for their Units. They were responsible for what their staff was or was not doing. T. 667. Golden was present at this meeting. T. 666

Hiring

Unit Managers hire employees. T. 502. Potential nursing department hires were initially screened by human resources. A Unit Manager would then meet with them and interview them. If they were a good fit, the unit manager would hire them. If the Unit Manager needed more information, they would have another Unit Manager complete an interview. T. 535-36.

Suspend

Unit Managers could suspend employees for insubordination, refusal to perform their job, suspicion of abuse and neglect. T. 671; 537. They could also suspend employees if there was conflict between staff members. T. 671; 537. Carchidi told all Unit Managers at the meeting she held in the first week of November that they had the ability to suspend employees. T. 671.

Discipline

Unit Managers were responsible for discipline of employees on their unit. T. 503, 516; Union 3. The Unit Manager would fill out the disciplinary action form, meet with the employee to review it, and then the form would go to the director of nursing. T. 503. Unit Managers could recommend skipping steps of progressive discipline, and their recommendations were typically followed as long as they had a reason. T. 549

If there was an abuse or neglect complaint, an investigation would be conducted. Typically, the Unit Manager, Social Work, and someone from Administration would be involved in such an investigation. T. 549.

Golden admitted she was advised by HR she was empowered to discipline nursing staff. T. 89. She would fill out the write-up and present it to the employee. T. 90. For non-nursing staff, she would discuss it with their Director. T. 90-91.

Responsibly Direct

Unit Managers typically touched base with their night staff on arrival at the facility. They made sure assignments for staff were correct. They would ensure neighbors were safe and staff were performing their duties. T. 542. Unit Managers were responsible to catch errors by staff and to make sure that errors by staff were corrected. T. 549-550. They were responsible for the operation of their unit. T. 666.

Secondary Indicia of Supervisory Status

Meetings

Unit Managers attended Morning Report with the Department Heads each weekday at 8:30 a.m. T. 551; 30. Unit Managers attended Falls Meetings which were management employees. T. 30, 31; 671-72. The Unit Manager for NBI and other Unit Managers who had patients with behaviors attended the Behavior committee meeting with the psychiatrist, CSS head and CSS supervisor. T. 30; 672. R-50. Golden testified she also attended a weekly nurse manager meeting on Fridays at 12:30 with other Unit Managers, the ADON and DON. T. 30.

Evaluations

Unit Managers were responsible for doing evaluations of their Unit. T. 89-90; 520, 547, 668. The process for evaluations is the Unit Manager fills out the form, and then meets with the employee to discuss the form and set goals for the next year. T. 503. The employee can make any comment on the form, and then it is sent to Human Resources to be placed in the employee's file. T. 503; R-28.

Pay and Hours

Unit managers at the facility are paid on a salary basis. T. 102; 503. The position is a management position and employees do not have set hours. They may have to work nine or ten hours on a particular day to get all of the work done. T. 277; 503-04.

Management Emails

Unit Managers were included on compliance alerts sent to them by the Administrator (R-26; 356-57) and on emails with communication from the Administrator. T. 357; R-25; R-27.

NBI Unit Managers

Golden testified that in addition to the normal duties of a Unit Manager, the Unit Manager on NBI also oversaw the activities staff and CSS staff assigned to the Unit. T. 28; 542.

This oversight involved ensuring the activity staff was following the plan on the board for the day and making sure the CSS staff were completing their work on the unit. T. 542-43.

The NBI Unit Manager could counsel and discipline CSS or activities staff and would then let their director know. T. 551.

Policy Setting and Direction of NBI Unit

Golden communicated to Weir regarding changes being made on NBI. T. 364-65; R-32. These included projects to add special mirrors to the unit and add a panic buttons for staff. R-32; 33; T. 368-69; R-37; R-38. Golden had started these projects before Weir became the Administrator and they were completed while he was there. T. 364-65.

Golden had the authority to temporarily suspend patient phone calls on her unit for safety reasons. T. 370-71; R-35. Golden testified she was working on a revision to the NBI Policy while she was the Unit Manager. T. 85-86.

Golden could hold events for staff on her unit. T. 373; R-36. She issued direction regarding breaks and cell phone use for staff on her Unit. T. 95-96.

Golden's Performance

Weir observed Golden to be struggling in her role as Unit Manager in 2019. T. 376. Golden was in his office multiple days a week with issues, looking for assistance. T. 376. Weir received a number of complaints from staff on the unit about Golden. T. 376. Simon Naccarato, the program specialist came to see Mr. Weir at least two times prior to the Fall of 2019 about Golden. Naccarato had complaints about how things were being handled on the unit. T. 378. Cathleen Quinn, a program specialist also made a complaint to Weir regarding Golden. T. 378.

Weir tried to do mentoring and coaching with Golden to assist her with developing managerial skills, but Golden's performance did not seem to improve. T. 378.

On August 16, Golden sent an email to Weir and other Department Heads stating she believed “we” had lost control of the Unit. R-39; T. 100. She referenced being new to management and “trying to address issues with the staff.” R-39. Weir was concerned and spoke to Golden who claimed she had not been trained properly. T. 379.

After receiving the email from Golden, in September 2019, Weir arranged for Golden to attend a front line supervisor training through an organization that provided trainings. T. 379. He arranged for other employees to attend other trainings, but Golden was the only employee he sent to that program. T. 379; R-40.

Golden’s performance did not improve after attending the training. T 382. There were still problems with divisiveness on the unit and issues with staff not working together. T. 382.

While she was the ADON, Carchidi also spoke with Golden about her role as the Unit Manager on NBI. T. 678-79. Golden spoke to Carchidi because Golden was upset that she wanted to change multiple things about how the NBI Unit was run and was not being successful. T. 680. Carchidi told her that she could not change the patient population. T. 679. Carchidi told her that she could change the environment. T. 680. Carchidi talked to Golden about management styles, how to deal with people and talk to people. T. 680. When she left the conversation, Golden seemed calmer. T. 680.

Carchidi spoke to Ms. Golden again in October 2019. T. 680-81. Carchidi noticed that Golden seemed upset and asked her what was going on. T. 681. Golden told Carchidi that she was having trouble making the change from being one of the nurses, one of the group, to being a member of management. T. 681-82. Carchidi told her that she understood it was difficult, but that more was going to be expected of her now that she was a manager. T. 682.

Golden's Behavior at Management Meetings

In the fall of 2019, Weir also became concerned when he observed Golden come in to management meetings and start saying who she believed was for or against the Union. T. 384. These statements seemed to violate the direction management employees had been given not to ask specific questions about employee support of the Union. T. 384. Periano also raised a concern that Golden's behavior could put the facility at risk for receiving an unfair labor practice charge. T. 384; 827.

Disturbingly, Golden's behavior did not change even when she was repeatedly told to stop. T. 827, 835. Cole and Carchidi both reported similar behavior by Golden to Weir. T. 690; 881-882. Periano eventually asked that she be excluded from management meetings because he believed she was trying to draw an unfair labor practice charge. T. 827; 835.

Suspension of Golden

In October 2019, Weir suspended Golden pending an investigation into whether she was actually asking staff about their position on the union. T. 385. The investigation did not reveal any direct information that she was asking employees about their position, and Golden was brought back to work. T. 385-86. While she was out, the facility also investigated whether she had sent inappropriate text messages to CSS employees. T. 435. There was no evidence to support that claim either. T. 435.

Return to Work and Termination

When she returned, Weir said he was glad she was back and he hoped they would not have any more issues. T. 386. Golden claims that Camerota also met with her and told her that he brought her back because Weir felt she needed more training. T. 63-64. Camerota told Golden she was not to report who she believed was for or against the union any more. She could only report whether she presented the literature to an employee, what their body language was,

whether they spoke to anyone else right after, and what they did with the literature afterward. T. 66. Camerota also told her that Vice-President of Nursing, Mary Pat Carhart would be meeting with her to mold her as a manager. T. 66. Carhart met with Golden to talk about her roll on the Unit. T. 73. The union was not discussed at this meeting. T. 73.

Following her suspension, Golden sent an email regarding a former employee returning to the facility. T. 382; R-41. While Golden had the authority to exclude an employee from the NBI Unit, Weir was concerned about the tone of the email as it was not professional. T. 382-83. In fact, the email caused two employees to complain about Golden's leadership on the NBI Unit. T. 388. Weir spoke with Golden about the email. T. 431.

On another occasion, Carchidi and Carhart noticed that Golden seemed upset at a managers meeting. T. 683. They met with Golden after the meeting in Weir's office. T. 683. Golden vented during the meeting. She vented that she wanted to remain friends with her friends, but was expected to be a manager. Things were not going well on the unit. T. 684. Golden says that she also vented about the management meetings and the facility's union avoidance campaign being a "witch hunt". T. 75

Carhart spoke to Golden about how to be a manager. T. 686. Carhart suggested that as a manager, you needed to learn to use the "pause button" and not talk sometimes. T. 686. Golden also says that Carhart told her that the union avoidance campaign was not a "witch hunt". T. 75.

On Golden's last day of employment, Golden once again came into the afternoon management meeting and began listing the names of people who were for the union and people who were not for the union. T. 389. Following that meeting, Weir met with Periano and together they called Camerota. After reviewing Golden's history, her inability to make the transition to management, and her inability or unwillingness to follow the directions given for

the union avoidance campaign, Weir indicated that he was ok with terminating Golden because she just wasn't making the transition to management. T. 390.

Weir and Carchidi met with Golden. T. 391. Weir told Golden that they no longer felt she was a good fit and that she did not seem to be making the adjustment to the management role. T. 392; R-42.

Joshua Endy

Joshua Endy began at Northeast Center as a CSS employee. He was promoted to CSS Supervisor in May 2017 and received a raise. R-19. He remained a CSS Supervisor on the night shift until his termination on November 19, 2019.

CSS Supervisors

During the day, the Director of the CSS Department is in the building. On the night shift the only supervisors in the building on a regular basis are the Night Nursing Supervisor and the CSS Supervisor. T. 334. Each CSS shift had between 3 and 12 CSS workers. T. 215. Each shift also has either one or two CSS Supervisors. T.233. CSS Supervisors were responsible for assigning work to the CSS employees, guiding and supervising the CSS employees through their shift, and discipline of CSS employees. T. 333; 592; R-17. The CSS employees on the shifts reported to the CSS supervisor in the first instance. T. 591.

In 2019, there were two supervisors for each shift (day, evening, overnight). T. 591; 333. Each CSS Supervisor worked five (5) days per week with every other weekend off. There was at least one CSS supervisor for each shift each day. T. 592; 334-35. On the days when the CSS Supervisor shifts overlapped, the supervisors shared the supervisory duties. T. 592.

When one CSS supervisor was present, that Supervisor was responsible for all of the supervisor duties. When there were two CSS Supervisor on the shift, one of them would make the assignments or they would work together. CSS Supervisors would trouble shoot issues that

came up with staff together. T. 763. Sometimes they decided one would take the supervisor role based on what other positions they needed to fill, and sometimes it was decided by who was on the shift first. T. 763.

Unless a Unit Manager was on their unit or the CSS Director Marcos worked because they were short in the CSS department, the only supervisors in the building on the night shift were the Night Nursing Supervisor and the CSS Supervisor. T. 223.

Assignment of Work

CSS Supervisors were responsible to assign employees to their job tasks during their shift. T. 194; R-44. These roles included individual supervisions (IS), staff breaks, close visual observation (CVO), the front desk, and the NBI Unit. T. 194; 215; 762. CSS Supervisors made the assignments for all of the CSS employees throughout the building on their shift. T. 230-31. No one else tells the CSS Supervisors how to assign the jobs on their shift. T. 767. While they tried to take into account employee preference for assignments, there were times employees had to be assigned to rolls they did not want to do. T. 770. CSS Supervisors had the authority to require employees to do the assigned tasks. T. 770. Good assignment of rolls is important to ensure the night goes smoothly and everyone has a pleasant night at work. T. 769. Endy testified they had tried making assignments on a strict rotational basis at one point for about a month, but it did not work and they returned to having the CSS Supervisors make the assignments based on their judgment. T. 197. In making these assignments, the CSS Supervisors considered a number of factors.

NBI

Endy testified that what made someone good at the NBI unit, in his judgment, was someone who bonded with the neighbors, learned their triggers, was good at de-escalating them, and who became comfortable around them. T. 217. He avoided assigning workers who became

easily scared, or who were uncomfortable with the sexually explicit nature of some of the behavior and talk of the neighbors. T. 218; 764 (Cruz similar). Both Endy and Cruz placed more experienced CSS workers on NBI and had less experienced workers work with more experienced workers on NBI. T. 218; 767.

Close Visual Observation (CVO)

CVOs required one CSS employee to be with one patient. The CSS must be one arm's length away from the patient documenting what the patient is doing. T. 249. For CVOs, CSS Supervisors must review the patient care plan and assign an appropriate CSS worker. T. 770. Endy considered whether the CSS worker matched the needs of the individual patient. He gave examples that if the patient had a lot of energy, a CSS worker who could think of things to keep the patient occupied was good. If a patient was easily agitated, a CSS worker who was good at calming the person down would be good. T. 218. He would try to put staff with patients who trusted them and to avoid putting staff and patients who had conflicts together. T. 218-19.

Endy would also consider whether CSS workers had just worked a shift, and if so, he would put them with easier CVOs (for instance, a patient who slept most of the night) and put the fresher workers with harder CVOs. T. 231. Ms. Cruz considered similar factors in making assignments to CVOs. T. 764. She also noted that based on the patient's needs or the patient care plan, gender might also play a role in the assignment. T. 770.

Front Desk Assignment

The front desk assignment was required to handle incoming phone calls, use the computer, check people in and out of the facility, and prevent patients from leaving. T. 765.

For the front desk assignment, Endy and Cruz considered whether the person was good with the phone and computer system because not everyone could manage it. T. 220; 765. The

person assigned to the front desk must also be able to talk a neighbor out of trying to leave the facility. T. 765.

Increased Supervision

Increased supervision (IS) involved walking from room to room of a list of patients located throughout the facility. The CSS worker needed to visualize the patient, and if the patient was sleeping, the CSS worker would visualize that the patient was breathing. T. 221.

Endy would consider employee preference for IS. Because it involved a lot of walking, he would consider whether someone was tired from working another job or shift, or if they wanted a walking job to stay awake. T. 221. He also considered whether, if they were short, he could put someone on IS who was also able to respond to codes, such as himself or Josie (if she were working). T. 222. Cruz considered similar factors as well as any physical limitations of her staff such as a leg injury. T. 766.

Other Assignments

The Break Staff person gave breaks to the staff. T. 227. Often, a Supervisor might have to take both breaks and IS if they were short staffed. T. 227. Sometimes Mr. Endy was able to assign himself to therapeutic support (TS) so that he could help throughout the building. T. 229-30. Generally, if they had enough people to fill all of the positions for the night, the CSS Supervisor was assigned to therapeutic support just to have an assignment on the sheet. T. 773.

Other Considerations in Making CSS Assignments

Endy testified he also took into account his staff's needs when making assignments. He would consider whether someone had worked in a difficult job, such as on the NBI unit, for several shifts and needed to have a break in an easier job. T. 228-229. Endy would watch employees for signs of employee burnout such as becoming short tempered, not being as active

with neighbors, not talking well with neighbors. T. 229. When that happened, he would give them a break to an easier assignment. T. 229.

Both Endy and Cruz indicated on a perfect night, it did not take long to fill out the assignment sheet; however Cruz testified it took approximately half an hour to fill out the assignment sheet on most nights because of staffing issues. Once filled out, the CSS Supervisor then met with the Nursing Supervisor to discuss where people would be throughout the night and how breaks would be managed. T. 771-72.

Responsibly Direct

The CSS supervisor was supposed to check on employees throughout the shift to make sure they were doing what they were supposed to be doing. T. 245. This was not able to happen every night because sometimes they were short staffed. T. 246. When the CSS Supervisor was able to do hourly checks, they would note the checks on the daily shift report. T. 247; R-58 p. 5.

If any employee needed to leave a shift during a shift, they would go to the CSS supervisor. The supervisor would need to cover the position before letting them go. This would involve using another employee, asking the nursing supervisor if she had any staff who could fill in until the end of the shift, denying permission to leave, or figuring some other solution. T. 233.

Sometimes CSS supervisor had to adjust assignments during the shift. This might happen because of a no call/no show. In that case, the CSS Supervisor might have to assign one CSS worker to two patients. T. 772. Changes to the shift might happen because of a conflict between a patient and the CSS employee, such as when a patient became violent with a CSS worker. The CSS supervisor could make a change in staffing both to protect the CSS worker and to calm the patient. T. 772-73.

The facility had a rule that cell phones were not supposed to be used on shift. T. 248. However, given the nature of the job, CSS night workers were sometimes allowed to use their

phones. T. 249. The CSS Supervisor determined whether the phone use was appropriate or not. T. 250. A CSS supervisor could direct an employee to put their phone away and pay attention to their job. T. 250. CSS Supervisors also tell employees when to go on break. T. 250

Sometimes, during the night, the CSS Supervisor and Nursing supervisor decided together whether a patient could be placed on a rotation (IS) instead of a CVO if they were short staffed that night. T. 226. The CSS supervisor would communicate with the Nursing Supervisor regarding changes in CVO and IS status throughout the night. T. 241.

DeAbreau has counseled CSS Supervisors about their employees not taking breaks and about employees not filling in appropriate documentation. T. 614; T. 782; R-48. He has counseled CSS Supervisors regarding issues they need to handle with the employees on their shift (T. 781-82); employees not clocking in and out for their breaks. T. 782. DeAbreau would also leave notes for the night shift CSS Supervisors in their office to have employees correct errors in paperwork. T. 784. DeAbreau counseled Endy on his decision making as a supervisor in Endy's review. R-48.

Discipline

CSS Supervisors had the authority to discipline CSS employees. T. 610. The facility had discipline that included notification or education, suspension and termination. T. 612. The CSS Supervisor would bring the employee into the office if DeAbreau was available and discuss it together. T. 611. For the first step, the CSS Supervisor could also hold the meeting with the employee without DeAbreau and then advise DeAbreau of the meeting. T. 613.

For the night shift, if an employee was chronically late, Endy would write them up and put it in the folder in the office. T. 239. Endy estimated he wrote up and gave out 3-5 disciplines as a supervisor. T. 236; R-52.

Cruz testified she had disciplined employees for No Call/No Show, sleeping on the job and lateness. T. 777. She fills out the form and discusses it with DeAbreau when he comes in in the morning. Typically she and DeAbreau will meet with the employee together. T. 778. DeAbreau approves her disciplines without changing them. T. 788. Cruz described the discipline as ones that would “stick.” T. 778. Cruz estimated that a “low ball” figure would be that DeAbreau agreed with her discipline 75 percent of the time. T. 780.

Other CSS Supervisors issued discipline for insubordination, failing to timely call a code, not completing work, No call/no show, excessive breaks and lateness, cell phone use. R-18.

Overtime

CSS Supervisors could approve overtime without anyone’s permission. T. 603. DeAbreau would only deny overtime if the shift was full. T. 603. Because DeAbreau is not there on the night shift, the CSS Supervisor makes the decision if the shift is full. T. 604; 761.

If a CSS Supervisor had someone stay for overtime, the supervisor would fill out the form. T. 237. If DeAbreau was on vacation, the CSS supervisor would sign the form approving the overtime. Otherwise, they would leave it for DeAbreau to sign. T. 237. At the time DeAbrue signed it, the overtime had already been worked. T. 237. DeAbreau has never disagreed with Endy’s decision to have someone work overtime. T. 238; 604.

Other Indicia

Supervisor Reports

Supervisors filled out two reports at the end of each night. T. 194-95; 197. One was the shift to shift report which provides information on the shift to the on-coming supervisor. T. 234; R-45. The other was the Quality Assurance Daily Shift Report which recorded information on orders, breaks, codes and documentation of CSS employees. R-58; T. 244-45.

Response to Codes

Because of the nature of the patients at the facility, there is sometimes a need to have assistance with a patient. Northeast Center has developed a series of “codes”. A code is called over the loudspeaker. A Code “Rainbow” means that a patient has become violent or is escalated and not calming down T. 213. The CSS Supervisor and Nursing supervisor respond to a code Rainbow. T. 214. A Code “Moon” means a patient is missing. T. 214. The CSS Supervisor and Nursing Supervisor respond to a code Moon. T. 214. Other available staff may also respond; however, the CSS Supervisor is required to respond. T. 213-14.

Attendance at Supervisor Meetings

While Endy testified he did not attend supervisor meetings because he worked the night shift, he was included on invitations to CSS Supervisor meetings and did participate when he was not sleeping. R- 263-64; R-47.

Pay

Endy received a raise when he became a CSS Supervisor. His rate was not the same as CSS employees. R-19.

Meeting with Endy and Termination

In November 2019, Periano received complaints from a CNA and a CSS worker about Endy. T. 806. Periano was approached in the lobby by the CSS employee who told Periano that Endy was trying to force people to sign cards. T. 807. Periano responded that she did not have to sign the card, but she could sign the card if she wanted to. T. 807.

Two days later, a CNA came to the administrative conference room and told Periano that Endy was trying to force people to sign cards. She also complained that he did not follow the dress code and he came and went as he pleased. T. 808.

Periano responded that it was not unusual for a supervisor to come and go. T. 809. The CNA indicated she was a little afraid of Endy. Periano advised the CNA she did not have to sign a card. She could sign a card. It was her business whether she signed a card or not. He also advised her that if she felt threatened, she should follow up with the Administrator or Human Resources. T. 809.

Shortly after, Periano became aware of complaints made to other consultants about Endy pushing card signing. T. 810. As a result, Periano spoke with DeAbreau about the concern. Because Endy was a supervisor, and human resources was not available to help DeAbreau with the meeting, they decided to speak with Endy together. T. 810; 812; 633.

The meeting began with Periano addressing the dress code with Endy. T. 814. Periano then told Endy they had a complaint about him passing out union cards. T. 633. Periano asked Endy if he was a supervisor, and Endy said that he was. T. 253; 633. Periano asked him, if he understood supervisors could not pass out cards. T. 205. Periano explained that if Endy used his position of authority and power to influence signing cards, it could be considered a management taint and it violates the NLRA. T. 205; 814; 633.

Endy indicated he was passing out cards, and that he was not the only supervisor doing so. T. 205; 633; 815. Endy claims that Periano asked him who else was handing out cards. T. 206. Periano denies he asked him this question, but agrees Endy brought up other supervisors passing out cards. T. 815.

Endy became aggressive. He threw his badge at DeAbreau, and said I don't need this fucking job. T. 634. He slammed the door so hard it broke the garbage can behind the door and put a hole in the wall. T. 634. While Endy claims the door slipped out of his hand, the photographs demonstrate that if that were the case, the garbage can and wall carve out behind the

door would have prevented the door handle from hitting the wall and causing the hole. T. 634; R-21; R-22. Endy was not suspended or terminated in the room. T. 815-16. DeAbreau testified that in the hallway, DeAbreau told Endy that he was terminated for insubordination. T. 634.

DeAbreau made the decision to terminate Endy because of his aggressive actions, insubordination, and disrespectful manner. T. 635. Endy was not suspended or terminated for passing out union cards. T. 635. DeAbreau has terminated other employees for insubordination and property damage. T. 635; R-53.

Following the termination, DeAbreau advised Weir what had happened. T. 337; 638. He also made a statement regarding the events. R-20. Weir summarized the event for the file. T. 347-48; R-49. Weir directed photographs be taken of the damage to the wall. R-21 and R-22. The photographs show that it would have taken a great deal of force to break the garbage can that was behind the door and put a hole in the wall. R-21. The photographs also show the wall cracked at the top of the door jam due to the force with which the door was thrown open. T. 342; R-21, #7.

Cathy Todd

Cathy Todd was an LPN at Northeast Center until her termination in November 2019. T. 147; Jt. 5; R-13. At the time of the incidents leading to her termination, Todd was an evening shift nurse on NPR-4.

Abuse Prevention Policy and Training

Employees at Northeast received required training on abuse prevention annually. T. 315; R-9. Verbal abuse is defined as “the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families or within their hearing distance, regardless of their age, ability to comprehend, or disability.” R-12 pg. 10. Mental abuse is defined as: “verbal or nonverbal conduct which causes or has the potential to cause the

resident to experience humiliation, intimidation, fear, shame, agitation, or degradation.” R-12 pg.

12. Todd agreed it was not acceptable to yell at a neighbor or to swear at a neighbor. T. 174.

Todd admitted there were patients on her floor who had anxiety around food and were messy eaters, but that it was not acceptable to take food away because the person was a messy eater. T.

174. Todd agreed it was not acceptable for an LPN to makes fun of the way a patient ate. T. 175

Medication Administration

The facility has a policy for administration times of medication. T. 175; 319; R-11. The policy permits medications to be given one hour before and one hour after the time ordered in the chart. T. 175; R-11.

The facility has a Medications Self-Administration Policy that governs patients who are able to self-administer medications. R-10; 318. It provides that. If a patient did not come to the desk for their medications, the LPN would go to the room and prompt them to come to the medication cart. T. 700. If the patient still did not come, or if the patient requested, the LPN would need to bring medications to the patient. T. 701.

Todd acknowledged that the LPN controlled who got medications and when. T. 173; 176. She further agreed that if a patient did not come to the desk for any reason, the LP was still responsible to give patient medication. T. 175.

Todd's Prior Counseling

Cynthia Pope was the Unit Manager on NPR-4 and Todd's supervisor. T. 506. In 2018, Pope had concerns about how Todd was treating a neighbor. Pope held a mediation with the social worker, Todd and the neighbor to try to improve the situation. Todd became very angry. The patient had to be transferred off of the floor because of Todd. T. 507.

In June 2019, Pope met with Todd to review her evaluation. Pope noted concerns about Todd's attitude, her explosiveness and anger. T. 179; 508-509; R- 57. Todd spoke loudly to Pope; she slammed her arms down. T. 510, 526. She took a copy and left abruptly. T. 510.

In early October 2019, Pope again met with Todd about her behavior after Pope heard Todd yell at a neighbor to sit in a chair and not move. T. 510. Pope met with Todd along with a Social Worker, Heather Britton-Schrager and the ADON Jennifer Candee. T. 510. Pope told Todd she could not restrict the movement of the patient. Todd became angry and walked out of the meeting. T. 511. Pope had a write up for Todd, but was not able to give it to her because Todd was so angry. T. 511

On November 11 or 12, 2019, Pope observed an interaction at the nurses' station involving Todd and CNA Sheranique Lewinson that gave her concern. Pope pulled Lewinson aside and asked her what was going on. Lewinson told Pope about a number of concerns she had with Todd. T. 512-13. Pope asked Lewinson to make a written statement, which she did. T. 512, 513, R-1; 466-67. Pope provided the statement to Carchidi. T. 514; 297; R-1. On November 12, Weir received the complaint from Carchidi. Because it involved a complaint of patient mistreatment, Weir immediately directed an investigation. T. 297; R-1.

Initial Interviews

Medical Records Director and Legal Liaison Julie Cole met with Carchidi to interview the two patients referenced in the complaint. Cole was chosen for the interview because of her existing relationship with the two patients. T. 871.

Patient J reported that Todd had been withholding food from her; and that Todd was aggressive to her in speaking to her. T. 871. Because of her brain injury, J had difficulty eating and would spit while she ate. T. 871. At one point, Todd took food away from J telling her she "didn't have fucking time for that." T. 871. J was quite upset during the interview. T. 871-72.

The patient apologized and indicated she would work on her behavior so she would be allowed to eat. T. 872. Cole tried to reassure her that she could eat in accordance with her care plan regardless of her spitting. T. 872.

Patient R reported that Todd was withholding food from her if Todd felt she wasn't behaving the way she should behave. T. 873. She also reported that she was being prevented from making her evening phone calls to her family if she wasn't behaving the way Todd wanted. She had to sit in a chair by the nurses' station while Todd allowed all of the other patients to make phone calls in front of her or in place of her. T. 873. R also stated that Todd would discuss patient behavior, diagnoses and medications with other patients. T. 873.

Cole reported to Weir what she had learned, and that what she learned was abuse under the New York Department of Health regulations. She reported that Todd should be immediately suspended. T. 874; R-12; T. 694. Carchidi agreed. T. 691. Cole ultimately advised Weir that it was her opinion that Todd should be terminated because she had withheld basic human needs—food, medications, and the right to talk to family from patients and it was abuse. T. 875.

Interview with Todd and Subsequent Suspension

Weir and Carchidi called Todd together. T. 691; 302-03. Weir asked Todd about the complaints about how she spoke to neighbors, withholding food, and talking to people about how they were eating. T. 162; 692; 302-03. Weir asked her about being on her phone. T. 161-62; 693; 302-03. Weir asked her about talking to neighbors about the medical conditions of other neighbors. T. 162; 693-94; 302-03. Weir asked Todd about not letting patients use the telephone. T. 162. Todd denied all of the allegations. T. 694; 303.

Weir offered her the opportunity to come in and write a statement. Todd declined. T. 694; 303. Carchidi made notes of the phone call on November 13. R-3; T. 695-96.

Continued Investigation

Weir then directed the social work department to conduct interviews of the patients on the floor. He directed Carchidi to conduct interviews of the staff who worked with Todd.

Social Worker Interviews

Social Workers at Northeast engage in assessment and advocacy for patient; investigations involving patients; and on-going support for patients. T. 557. They frequently interview patients at the facility. T. 557. Social workers interview patients quarterly to assess mood and memory; when there is potential mistreatment of the patient by another patient or by staff; and when there is an on-going court matter. T. 558.

In 2019, Britton-Schrager was the social worker for two NPR 3 and NPR 4. T. 558. Patients on NPR 3 were further from discharge, and were working on their rehabilitation. T. 559. Patients on NPR 4 were closer to discharge, but their stay on the unit could be from several months to several years. T. 559; 583. Many of the NPR 4 residents, because of their brain injuries, had executive functioning issues, meaning they would get simple things out of order. In those cases, the facility still needed to provide care to the Resident, including making certain they received their medications. T. 587.

Britton-Schrager was not surprised by the Todd investigation because she had taken statements from patients who had been mistreated by Todd in the past. T. 559-60.

Each of the social workers took a basic form and asked the residents on their list the questions on the form. T. 570; R-6. In particular, the form asks questions that relate to emotional or verbal abuse or intellectual abuse or neglect. T. 570. These types of forms are used any time the facility must do an investigations involving patients. T. 305; 307. Investigations like Todd's investigation were conducted on a regular basis. T. 311. Following the interviews, the social workers compiled their findings. T. 572-73. Their conclusion was that there was

evidence that Todd withheld treatment or care from some residents she did not like. T. 574. The information was provided to Weir and Carchidi. T. 574-75.

Other Incidents Involving Todd

In addition to the interviews, Britton-Schrager also provided information to Carchidi about two prior incidents involving Todd. T. 574-75. One incident occurred on Valentine's Day 2019. Britton-Schrager heard a commotion coming from a patient. When she investigated, she found the patient crying and tearing up her own art work. Prior to this, the patient had been very proud of the art work. T. 560. This patient was less than a week from discharge and did not normally act out. T. 560. Britton-Schrager asked the resident what was going on. The Resident reported that she'd had an encounter with Todd that was embarrassing and she felt demeaned in front of her peers. T. 560. Britton-Schrager took a statement from the Resident and put it in a note. T. 560-61; R-8, page 3.

The second incident occurred in late October 2019. T. 562. The resident had gotten dressed for bed in a nightgown and did not want to come to the desk to get her medications on the mixed gender floor. She rang her bell and asked for them. Todd told her that she should have known to get her medication first. Todd refused to bring her the medication and told her it would be documented as a refusal. T. 562; R-8, pg. 2.

At the time of these incidents, Britton-Schrager had reported them to the Director of Social Work who provided the information to the DON (McCormick). T.564.

Staff interviews

Carchidi and Pope spoke to the two CNAs who worked on the same shift and same unit as Todd. The CNAs confirmed the patient complaints. T. 697; R-5; 303.

Pope Medication Pass

While Todd was suspended, Pope handled Todd's medication pass. During that time, Pope learned that Todd was not giving patients their medications at the appropriate time. T. 514-515. Pope also started hearing about other issues from the patients on the floor, such as a patient being denied a telephone call. T. 515. Pope made a subsequent statement about these issues and provided it to Weir. T. 515-16; R-4.

Termination

Weir and Carchidi met and reviewed the patient interviews, the staff interviews, and the information from Pope and Britton-Schrager. R-1-R-8. The investigation showed issues with the treatment of patients, not giving them medications, withholding food, making fun of the way patients ate. T. 702. The investigation revealed a long history of violations, not just one or two incidents. The investigation included mistreatment of the neighbors, medication administration issues, violations of residents' rights regarding food, taking food away from people, denying people their phone calls. T. 324. It was several occasion over periods of time. T. 325.

They agreed on a decision to terminate Todd. T. 324; 702. Carchidi and Weir called Todd together. Weir asked Todd to come into the facility. T. 325; 703.

When Todd came in, Weir and Carchidi met together with her. T. 704. Weir said that they had concluded the investigation, and that it showed ongoing issues including several residents and staff who identified her as having mistreated residents, verbally and mentally, that she had taken food from people and denied them phone calls; and that Todd was going to be terminated. T. 165; 325-26; 704; R-13; R-14. Todd denied the allegations. T. 326; 704.

While Todd claims Weir threatened to report her to the Nursing Board (T. 165), both Weir and Carchidi agree that Weir told Todd her behavior rose to the level that it could be reported to the Department of Health. T. 326; 705. Weir said this because he wanted her to

understand that her behavior was not acceptable anywhere. He wanted her to understand that they were charged with taking care of people and could not be adding to their stress and damaging their well-being. T. 326. No one reported Todd to any authority. T. 326. Weir did not report it because he believed that if Todd were terminated, the neighbors were going to be safe and that was the most important thing. T. 327. Carchidi has terminated another nursing staff employee for mistreatment of a patient. T. 707-08; R-15.

Todd's Alleged Union Activity

Todd claimed she talked "a few times" to Pope and Carchidi about the Union, but she could actually only recall one time she talked to each of them. T. 157 (Pope), T. 160 (Carchidi). Pope could not recall any time she talked to Todd about the Union. T. 506.⁴ Union activity played no role in Pope's decision to report the incidents involving Todd. T. 522.

Carchidi recalled that when Carchidi was still ADON, she spoke with Todd who said that she was going to a meeting about the union to get information to educate herself. Carchidi responded that education was always good. Carchidi relayed her own personal experience working in a union facility. T. 705-06. Carchidi did not know Todd's position regarding the union when she made the decision to terminate. T. 707.

While the General Counsel attempted to impeach Carchidi, Carchidi's affidavit was actually consistent with her testimony. Her affidavit states she spoke to Todd once about the union, and she spoke to Todd a few times about health insurance and Todd's complaint about a Unit Manager. Neither of the subsequent conversations are tied to a discussion of the Union in Carchidi's affidavit. T. 721.

⁴ To be clear, Pope did not deny any such conversation; she only indicated she did not recall one occurring.

Weir did not know anything first-hand about Todd's union activity. T. 332. He knew only that there were rumors she was in support of the union. T. 332.

Leonard's Complaints to Patients

Kelly Leonard was an LPN at Northeast. She left voluntarily. T. 118. In November, the Director of the outside contractor housekeeping department made a complaint to Periano that two of his employees had complained Leonard was harassing them about union cards while the employees were working. T. 816-17. Periano also began having patients approach him telling him that there were not enough staff in the building and there were not enough supplies in the building. T. 819. Periano asked one of the patients why she thought there was not enough staff, and the patient told him that Leonard told the patient this information. T. 819.

Periano held a meeting with Leonard. The Director of Housekeeping, Director of Maintenance, and Cole, were also present. Carchidi came in at the end of the meeting. T. 820.

Periano began the meeting by telling Leonard about the housekeeping complaints. T. 820; 122. Leonard responded she was not pro-union or that she was not passing cards, and Periano indicated it did not matter. That this had nothing to do with the union. T. 821. He asked her to please not solicit people while on work time. He told her whether she was pro or anti, she could talk about it on break time, in the café or break areas, but not while people are working. T. 821.

Periano then brought up the patient complaints. Leonard responded that she could talk to patients if she wanted to. T. 821. Periano admits he became upset because this impacted patient care. T. 822. Periano pointed out that these were neuro rehab patients and that telling them they were short-staffed or they did not have enough supplies could make them even more full of anxiety and nervousness. T. 822. Periano said it was a despicable thing for a nurse to do. T. 822. Leonard says that Periano said the union could not protect her license. T. 122. Periano

denies this and says that Leonard asked whether this was going to be reported to the Nursing Board, and Periano indicated he did not report things to the Board of Nursing, but that as a nurse himself, it was a really unethical thing to put fear and anxiety into residents who already suffered neurological issues. T. 822. The meeting ended and Ms. Leonard walked out. T. 822. Leonard was not disciplined as a result of the meeting. T. 140

Leonard claims that during the meeting, either the Maintenance Director or Periano raised the issue of her being on camera passing out cards. T. 121; 122⁵. The cameras in Northeast Center are security cameras that were put in place for the safety of Residents and employees prior to February 2019. T. 394. The cameras view the following: the front door; the rear entrance; the loading dock area; the two side entrances which are supposed to be locked. T. 394-95. They were not related to the union. T. 394-95.

Letter Regarding Raises

Jt. Exhibit 6 was posted for employees after Weir received a number of questions regarding raises. T. 399-400. At that time, the Union continued to campaign at the facility and had filed a number of unfair labor practices. T. 400.

Alleged Union Animus by Northeast

The General Counsel and Charging Party introduced other uncharged incidents presumably in an attempt to create an inference of Union Animus by the Employer. None of these examples demonstrate animus.

Both Golden and Leonard complained that various department heads and unit managers would be in different parts of the building on different shifts. When pressed, Golden could not

⁵ Leonard's testimony on this issue was not consistent.

identify a single person who came on her unit without a reason to be there, and finally resorted to stating she was “told” this by some unknown person. T. 88-89; 102-03.

Leonard pointed to the Director of Dietary and Director of Housekeeping as her examples. Leonard did admit, however, that employees from both departments worked throughout the building and department heads had 24/7 responsibility for their employees. T. 142. While this practice may have seemed strange to Leonard, an evening shift LPN, it was actually part of Weir’s response to the recommendation from Periano that management needed to be more visible on both the evening and night shifts. T. 869-70

Leonard also complained about an event the parking lot with Cole. Cole testified she received an employee complaint that the driveway to the parking lot had been blocked and the employee was late for that reason. T. 878. Cole went to the parking lot to see what was going on. T. 878. She found cars parked in non-parking areas and people blocking cars from moving. T. 878. Cole saw a person wearing an 1199 SEIU shirt who was not an employee of the facility. T. 878-79. She asked him to please leave the property. T. 878. He called her a name and refused. T. 878. At that point, Cole asked DeAbreau to pull his truck in front of the driveway to re-route traffic around the people standing in the driveway because she was concerned there would be an accident or someone would be hit by a car. T. 879. She called the police because the situation seemed to be escalating with yelling and cursing and she was concerned for employee safety. T. 880. It is clear from Cole’s testimony that her motivation was safety for employees, not anti-union animus. The union successfully continued to hold shift changes at the edge of the employer’s property for several more weeks.

GC and the Charging Party also point to various internal emails from Periano to other people as evidence of animus. Both Weir and Periano were clear that Periano sometimes threw out an idea that was rejected. His recommendations were not always followed T. 488; 828.

Charging Party points to an email regarding a temporary ban on Facebook in the building. Union 7. Periano testified that the concern was employees were not concentrating on patient care. T. 842. There was no evidence that any ban was actually enacted, and even the email suggests that it was not possible due to patient use of Facebook. Union 7.

CONCLUSIONS OF LAW

POINT I.

GOLDEN AND ENDY ARE STATUTORY SUPERVISORS WHO ARE NOT ENTITLED TO THE PROTECTION OF THE ACT

Supervisors are not protected by the Act and may be disciplined or discharged for union activity. *See* 29 U.S.C. § 152; *Miller Elec Co.*, 301 N.L.R.B. 294 (1991).

[I]ndividuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., 'assign' and 'responsibly to direct') listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 687 (2006) (internal quotations omitted). “In construing Section 2(11), the Board has often noted that it is the possession of supervisory authority and not its exercise which is critical.” *Beverly Enters.-Massachusetts, Inc. v N.L.R.B.*, 334 US App DC 173, 165 F3d 960, 962 [1999], citing *See, e.g., Cherokee Heating and Air Conditioning Co.*, 280 N.L.R.B. 399, 404 (1986); *Sheet Metal Workers Local 85*, 273 N.L.R.B. 523, 526 (1984); *Hook Drugs, Inc.*, 191 N.L.R.B. 189, 191 (1971).

To exercise independent judgment, “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning

and comparing data.”” *See Arc of S. Norfolk*, 2019 N.L.R.B. LEXIS 437, 11, 368 N.L.R.B. No. 32 (N.L.R.B. July 31, 2019), citing *KGW-TV*, 329 N.L.R.B. 378, 381–382 (1999); *GS4 Government Solutions*, 363 N.L.R.B. No. 113, slip op. at 3 (2016).

Golden

As a Unit Manager, Golden was able to hire, suspend, discipline, and responsibly direct employees. *See* Section 2(11); *see also Somerset Valley Rehab. & Nursing Ctr.*, 358 N.L.R.B. 1361 (N.L.R.B. September 26, 2012) (recognizing that unit managers are statutory supervisors); *HMR of Maryland, LLC*, 2002 N.L.R.B. Reg. Dir. Dec. LEXIS 127, *37(finding unit managers in a nursing home to be supervisors as the third-highest ranking supervisor). Unit Managers oversaw their units including all staff on the units. They were responsible for the overall operation of their Units. Both the testimony of Unit Managers Pope and Boice and the documentary evidence substantiates that Unit Managers were able to participate in each of these supervisory activities.

Golden, in particular, as a Unit Manager on the NBI locked unit, was responsible not only for the nursing staff, but all staff on the unit. T. 28; 542.

The Unit Manager job description and the NBI Policy are further documentation of Golden’s status as a supervisor. The job description (R-24) states:

Provides supervision, management, support and leadership for nursing personnel to perform total quality patient care. Coordinates the nursing staff and assist it eh accomplishment of nursing tasks in compliance with the established philosophies, objectives, policies and procedures of the department and the facility.

The NBI Policy (R-30) states in relevant part, “All staff assigned to the NBI Unit, other than members of the Management Team, shall report directly or indirectly to the NBI Unit Manager who shall have authority to direct NBI staff”. R- 30, pg. 3.

While Golden attempted to minimize her authority in her testimony, Golden admitted she was told she could issue discipline by Human Resources, and in fact did so. She further admits she had to oversee not just the nursing staff, but the CSS workers and Activities workers who were on her shift. T. 28. Golden sent out direction regarding behavior of staff on the NBI Unit, and send out direction regarding communication with other staff in the facility. R-34; R-35. She possessed supervisory authority, even if she didn't use it. *See Beverly Enters, supra*.

Carchidi was clear—she told Unit Managers they were responsible for discipline, suspension, evaluations, and the performance of staff on their units. She expected them to be responsible. In fact, Golden's inability to take on that responsibility was part of what frustrated Weir about Golden's performance. Golden was ultimately terminated for her inability to fully take on the manager role to which she was assigned. T. 390.

Golden also has substantial secondary indicia of supervisory status. She was paid on a salary basis, had a flexible work schedule, was sent management emails, and attended management meetings.

Endy

As a CSS Supervisor, Endy was responsible to assign work, discipline employees, and responsibly direct their work while on shift. *See* 2(11).

“In the health care setting, the term "assign" encompasses the [] responsibility to assign nurses and aides to particular patients. It follows that the decision or effective recommendation to affect one of these--place, time, or overall tasks--can be a supervisory function.” *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689 (N.L.R.B. September 29, 2006). Endy admittedly had the ability to assign CSS employees to particular places in the facility as well as their tasks on shift. CSS supervisors handled requests to modify assignments and made modifications when necessary.

Endy, and other CSS Supervisors, used their own judgment in making assignments to each area of the facility. Endy considered the needs of the particular patients and skill of particular employees in making assignments. For example, he assigned more experienced CSS to NBI, and assigned particular CSS workers to CVOs with patients whose needs they could meet. He considered whether employees who showed signs of burn out in difficult assignments might need to be moved, whether employees could work the phone and computer at the front desk, and whether an employee who had worked a double might not be suited to a task like ICS that involved significant walking. Cruz likewise testified that she considered various needs relating to the patients as set out in the care plans, the skills needed for the various positions, and the needs of employees.

General Counsel makes much of the fact that it only took one to thirty minutes to make the assignments, but there is nothing in case law that requires the physical act of assignment to take a significant period of time. While it may not have taken Endy significant time on any one night, it is clear from his testimony that he used his judgment and knowledge of employee's skill in making the assignments night after night. General Counsel also notes that on two occasions in 2019, Anita Rogers, a CSS Employee made the assignment. Rogers did fill in for Endy and Cruz when both were absent, but she did not carry out regular supervisory duties prior to November 2019. Unlike Rogers, Endy made assignments, both when Cruz was present and when she was not, multiple times per week throughout 2019 (and before). R-44. General Counsel attempts to distinguish Endy from other CSS Supervisors, but this position rings hollow. Endy did exercise authority to assign when he matched CSS workers with the needs of various patients each shift. Compare *Auburn Sr. Service Center*, 2016 N.L.R.B. Reg. Dir. Dec. LEXIS 114, *24-25 (2016) (Finding supervisory status where Nurse Manager assigned LPNs and CNAs to carry out specific

assignments, such as taking a patient to an appointment or providing intense supervision to patients that require it; making substantive assignments based on personality and skill set; assigning work based on patient level of care based on their needs, personality, and other factors.). As in *Auburn Sr. Center*, there was “no manual” for the CSS Supervisor to use in deciding who to assign to each roll each night.

Endy also engaged in discipline as did other CSS Supervisors. T.236 ; R-18; R-52. While Endy said that he only handled 3-5 disciplinary matters, statutory supervisory authority is not lost simply because it is infrequently exercised or only one or a few employees are under the supervision. *Jack Holland & Son, Inc.*, 237 N.L.R.B. 263, 265 (1978); *Matheson Fast Freight, Inc.*, 297 N.L.R.B. 63, 71 (N.L.R.B. October 18, 1989).

Endy also responsibly directed the employees on his shift. To have the authority to responsibly direct, "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 N.L.R.B. at 691-692. "[T]he employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary, [and] there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* Endy had authority to handle problems that came up during the shift, dealt with requests to leave early or call-outs; reassigned employees based on changes in patient status, correct employees, and kept employees on track. *Oakwood Healthcare*, 348 N.L.R.B. at 19-20. CSS Supervisors were held accountable through counseling and reviews for the failure of employees to complete paperwork, clock in and out for breaks, and complete tasks on their shifts.

Finally, Endy possessed secondary indicia of a supervisor, including a supervisory rate of pay, attendance at management meetings, and the ability to approve overtime for employees.

The Numbers Show Supervisory Status

The Board has also considered the ratio of supervisors to employees when discussing the likelihood of supervisory status. *See Robertshaw Controls Co.*, 263 N.L.R.B. 958, 971 (September 9, 1982) (finding ratio of 1 supervisor to 15 employees more likely than 1 to 35 employees); *see also Auburn Sr. Service Center, supra* at 29-30 (finding ratio of 1 DON and 2 ADON to 200 nursing staff to be "impracticable, unreasonable, and disproportionate" under Board law, and [to] provide evidence that supervisory status exists" for Unit Managers). *See, e.g., FORMCO, Inc.*, 245 N.L.R.B. 127, 128 (1979) ("If, as the Hearing Officer found, the foremen are not supervisors . . . the employee-to-supervisor ratio would be 30 to 1 and perhaps 70 to 1, a ratio which the Board has found to be disproportionate.").

Here, the nursing department had 200 employees. A single DON and ADON could not supervisor 200 employees. It is far more likely that the 8 Unit Managers, who were third in line on the supervisory chart (behind the DON and ADON) are, in fact, supervisors for the staff on their units.

Similarly, there were 46 employees in the CSS Department. It is unlikely that one Director could supervisor 46 employees across three shifts on his own. It is far more likely that the CSS Supervisors on each shift managed the day-to-day supervision of employees.

AS THEY WERE STATUTORY SUPERVISORS, NEITHER ENDY NOR GOLDEN WERE UNLAWFULLY INTERROGATED, OR THREATENED BY THE EMPLOYER

Nothing in Golden's testimony regarding her conversation with Camerota is a threat. Camerota and Periano repeatedly told her to stop asking employees about their position on the Union, and to stop soliciting grievances.-a lawful directive.

Periano denies telling Endy that the Respondent and the Union were going to sue Endy for passing out cards. Instead Periano states he told Endy that passing out cards was illegal because he was a supervisor, and that Endy's behavior could result in an unfair labor practice charge and a lawsuit (an accurate statement). T. 814.

But even if Camerota or Periano asked these employees about their union activity or pushed them to be more loyal to Northeast Center's position, that would not be illegal because they are supervisors.

[T]here has been established a class of employees, meeting the statutory definition of supervisors, who can be brow beaten, harassed, threatened, and discharged for failure to prevent the unionization of the establishment where they are employed, or, as in the instant case, if the employer concludes that such supervisors have exerted insufficient energy in discovering information concerning the union and thereby failed to assist the employer's antiunion campaign.

Purolator Prods, 270 N.L.R.B. 694, 738 (N.L.R.B. May 18, 1984), quoting *Western Sample Book And Printing Co.*, 209 N.L.R.B. 384, 390 (1974).

In fact, the Board has held that the employer does not violate the Act when it disciplines or terminates supervisory employees for their failure to "reveal enough information about the union and the union activities of their employees." *Id.* at 739.

"[T]he discharge of supervisors as a result of their participating in union activities is not unlawful. *Humana of W. Virginia, Inc.*, 265 N.L.R.B. 1056, 1060 (N.L.R.B. December 16, 1982); *World Evangelism, Inc.*, 261 N.L.R.B. 609, 609 (N.L.R.B. April 30, 1982).

Northeast Center was trying to fulfill its obligation to keep the Union campaign free from supervisor interference by two supervisors, and these charges should be dismissed.

**ENDY WOULD HAVE BEEN TERMINATED AND TODD WOULD HAVE BEEN
SUSPENDED AND TERMINATED EVEN WITHOUT THEIR ALLEGED PROTECTED
ACTIVITY**

8(a)(3) termination and suspensions are governed by the *Wright Line* standard. *See GM LLC*, 369 N.L.R.B. No. 127 (2020), 2020 N.L.R.B. LEXIS 378, *39-41 (N.L.R.B. July 21, 2020).

Under *Wright Line*, the General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 N.L.R.B. No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 N.L.R.B. No. 46, slip op. at 1-2 (2020).

Id. at 40. If the General Counsel meets that burden, “the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity.” *Id.*, citing *Hobson Bearing International, Inc.*, 365 N.L.R.B. No. 73, slip op. at 1 fn. 1 (2017).

A. Todd Was Suspended and Terminated for Mistreatment of Patients

The investigation into Todd’s behavior was not initiated by management action, but was caused by the complaint of a CNA regarding Todd’s behavior toward residents. Britton-Schrager, who both interviewed patients and provided additional statements against Todd was not a management employee and had no relationship to the union campaign. She acted out of a sense of concern for the patients she cared for. Pope acted because she finally had a DON who would listen to the concerns she had been raising about Todd since well before the union campaign even started.

Weir knew only from rumors generally how Todd felt about the Union. He did not know she played any roll in the organizing campaign. Likewise, Carchidi knew only that Todd was

seeking information about the Union. There is no evidence she believed Todd to be playing any organizing roll in the union.

Todd's suspension was part of a normal practice, required in the long term care setting, of giving an employee an administrative suspension when there were allegations of abuse while an investigation was pending. Todd's termination was supported by the evidence uncovered during the investigation. R-23, p. 41 (immediate termination for "mistreatment of a patient).

The evidence concerning Todd's mistreatment of patients was extensive. It came from patients, non-management staff, social work, and her Unit Manager. The evidence showed Todd had engaged in such behavior before, and that on at least two occasions, her Unit Manager had attempted to address it with her. Todd's review also raised the issue of how she behaved, yet Todd made no improvement. One wonders how long the General Counsel thinks Northeast Center should have allowed Todd to scream at brain injured patients, force them to sit in chairs because they were annoying, deny them food because they struggled to eat, or withhold necessary medications because they forgot to come to the desk to get them.

Todd herself conceded that it was the LPN's job to give the patient medication, even if it meant going to their room. She conceded no LPN should refuse food to a patient because they have difficulty eating. No LPN should swear at a patient or embarrass them in front of other patients because their brain injury causes them to struggle to eat or engage in normal behavior. The depth of Todd's cruelty was demonstrated by the patient who anxiously sought to talk to her family—likely the highlight of her day—but was made to sit and wait while other patients were allowed to make family phone calls in front of her because Todd didn't like her.

There is simply no evidence that the decision-makers knew of Todd's protected activity, let alone allowed it to influence them. By contrast, there is ample evidence Todd was terminated

because of how she treated vulnerable patients in her care. To reinstate Todd would be to spit on the staff who bravely brought her outrageous behavior to the attention of management; and would subject vulnerable patients to her anger, retaliation and abuse.

B. Endy Was Terminated for Insubordination, Abusive Behavior and Property Damage

Endy was never suspended. The conversation with Endy was designed to have a supervisor stop harassing employees to sign cards. Instead of holding a normal conversation, Endy threw his badge at his employer, told them he didn't need this "fucking job" and walked out slamming the door so hard it put a hole in the wall, broke the garbage can and cracked the door frame. Only after his outburst did DeAbreau terminate him for his behavior. R-23, p. 42, 44 (immediate termination for "intentional damage to destruction of property belonging to Northeast Center" and for "insubordination"). In *General Motors, LLC*, the Board recognized that Section 7 activity is separable from abusive conduct that may cause an employer to discipline an employee. 2020 N.L.R.B. LEXIS 378 at 38. The Board recognized an employer has the right to maintain "order and respect" in its workplace. *Id.* at 42.

Northeast sought to address complaints made by employees with Endy. It had no plan to terminate him, only to educate him. Instead, Endy swore at his supervisor and damaged property. His supervisor terminated him as a result.

TODD WAS NOT THREATENED WITH REVOCATION OF HER NURSING LICENSE BECAUSE OF PROTECTED ACTIVITY

Todd's claim that Weir threatened her nursing license is not credible in light of the fact Weir did not know how to report to the nursing board. T. 448. Both Weir and Carchidi recall Weir's actual statement to Todd was that her behavior could rise to the level that would be reported to the Department of Health as abuse. T. 326; 705. Weir's statement was accurate given the definition of abuse contained in the DOH reporting manual. R-,12 p. 10-12. There is

no evidence Weir made the statement because of Todd's protected activity as opposed to because of the outcome of the investigation. It defies logic that he would threaten the nursing license of an employee because of her union activity when he was already terminating her from employment at the facility. *See Armstrong Mach. Co., Inc. & United Food & Commer. Workers Union* , 343 N.L.R.B. 1149, 1164 (N.L.R.B. December 16, 2004) (finding alleged threat related to disagreement with employee and not union activity); *Chem. Solvents, Inc.* , 2012 N.L.R.B. LEXIS 264, *85 (N.L.R.B. May 15, 2012) (finding supervisor statement was because one of the men accused him, twice, of twisting the facts, not because of union activity).

GOLDEN WAS NOT TERMINATED FOR REFUSING TO VIOLATE THE ACT

Neither Golden nor any management employee was instructed to interrogate employees or illegally surveil employees and report back to anyone about what they learned.

[M]erely requiring supervisors to report what they see and hear in the normal course of their day, even though the supervisors detest being "finks" and informers, and discharging the supervisors for failure to be adequate "finks" in the employer's estimation, is not illegal. *Western Sample Book and Printing Co., Inc.*, 209 N.L.R.B. 384, 390 (1974). The unsavory connotation of "fink" aside, the fact is that an employer has a legitimate interest in learning what his supervisors know, for the law imputes their knowledge to him.

Purolator Prods. , 270 N.L.R.B. 694, 740 (N.L.R.B. May 18, 1984). Golden and every management level employee was given extensive training on avoiding surveillance and avoiding interrogation. It defies logic that Periano, a 19-year veteran in labor relations consulting would tell management employees to blatantly violate the act by going to a place where a union meeting was being held⁶ or outright question employees about whether they were for or against the Union.

⁶ There was no testimony that any management employee was ever at the pizza place or gas station while union activity was occurring. That in itself shows the absurdity of Golden's claims.

In fact, Golden's testimony regarding what Camerota told her she could and could not report back makes clear that Northeast Center was concerned about avoiding violations by Golden, not that it asked her to commit them. *See Humana of W. Virginia, Inc.*, 265 N.L.R.B. 1056, 1060 (N.L.R.B. December 16, 1982) (employer lawfully terminated supervisor who insisted on attending union meetings); *World Evangelism, Inc.*, 261 N.L.R.B. 609, 609 (N.L.R.B. April 30, 1982) (dismissing charge where the record failed to establish the supervisor was asked to use "coercive and unlawful means").

GOLDEN WOULD HAVE BEEN TERMINATED EVEN IN THE ABSENCE OF A UNION ORGANIZING CAMPAIGN

Weir, Carchidi, Carhart all tried to help Golden make the transition to management and to improve her communication with employees on her Unit. But as late as November 6, Golden was still sending emails that upset her employees because of their over-the-top tone. R-46. She was still not acting like a manager. Even her testimony in this matter shows she failed to make any effort to understand or carry out her role as Unit Manager. T. 28; 84-85.

After multiple efforts to improve her ability as a manager, the Facility could wait no more. She was terminated for her inability or unwillingness to fulfill the responsibility of the role.

LEONARD WAS NOT THREATENED FOR HER UNION ACTIVITY.

An employer may lawfully ban work time solicitations so long as that ban excludes times before or after regular working hours, lunch breaks, and rest periods. *Sunland Construction Co.*, 309 N.L.R.B. 1224, 1238 (1992). A medical facility is presumptively allowed to prohibit the distribution of literature in any work area and to ban solicitation more narrowly in "immediate patient-care areas." *N.L.R.B. v. Baptist Hosp., Inc.*, 442 U.S. 773, 778-79, 61 L. Ed. 2d 251, 99 S. Ct. 2598 (1979). In recognition of the fact that a medical facility's primary function is patient

care, and "that a tranquil atmosphere is essential to carrying out that function," the Board, with Supreme Court approval, has given health care institutions some latitude in restricting the exercise of Section 7 rights. *N.L.R.B. v. Baptist Hospital*, 442 U.S. 773, 99 S. Ct. 2598, 61 L. Ed. 2d 251 (1979); *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 98 S. Ct. 2463, 57 L. Ed. 2d 370 (1978); *St. John's Hospital & School of Nursing*, 222 N.L.R.B. 1150 (1976), *enfd.* in part 557 F.2d 1368 (10th Cir. 1977). Where solicitation might be unsettling to patients who need quiet and peace of mind, the balance between certain concerted activities and patient needs may be struck against employee rights. See *Beth Israel Hospital*, 437 U.S. at 483.

Northeast Center had a lawful policy that prohibited solicitation only while one employee to the conversation was on work time or when the parties were in patient areas. R-23, p. 14-15

Leonard admits that in her conversation with Periano she was not asked questions about solicitation, but was told to stop soliciting housekeeping employees on work time. T. 122-23. Nothing about this directive is illegal. See *Baptist Hospital*, 442 US 773. Periano further told Leonard she could solicit on breaks, just not in patient areas and not during work time. T. 821.

Leonard claims that during the conversation Periano threatened her nursing license for soliciting. Leonard's testimony makes no logical sense. Soliciting housekeeping had nothing to do with being a nurse. By contrast, Leonard involving patients in her discontentment certainly did relate to her behavior as a nurse. Periano admits the conversation was initially about solicitation, but became about patient care when Leonard admitted to telling patients the facility was short staffed. Periano admittedly became upset when he learned Leonard was talking to patients about perceived staffing shortages and material shortages. It is far more likely his testimony about the context of this conversation is accurate. For Periano, as an RN himself, this was an emotional issue about protecting patients.

Assuming Leonard was involving patients in union matters or discussing union matters in patient areas, such activity would not be protected activity. *See N.L.R.B. v. Baptist Hospital*, 442 U.S. 773, 99 S. Ct. 2598, 61 L. Ed. 2d 251 (1979); *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 98 S. Ct. 2463, 57 L. Ed. 2d 370 (1978).

Periano denies saying the union could not protect Leonard's license. In fact, Periano testified he repeatedly stated this had nothing to do with the union. He did, however, reference Leonard's ethics as a nurse, and likely said her behavior was despicable. That conversation about her ethics as a nurse had nothing to do with union activity. Leonard was potentially causing patients to fear for their safety and security, a violation of the DOH guidelines on abuse. R-12, p. 12-13. There is no nexus between protected union activity and any statement by Periano regarding Leonard's license or ethics. Periano did not threaten Leonard because of her union activity.

THE EMPLOYER DID NOT UNLAWFULLY SURVEILLE OR THREATEN EMPLOYEES WITH SURVEILLANCE

The Board has held that it will not find a violation of the Act where an employer monitors protected activity with security cameras because of a reasonable concern. *See, e.g. Smithfield Foods, Inc.*, 347 N.L.R.B. 1225, 1228 (N.L.R.B. August 31, 2006) (trespass concerns), citing *Washington Fruit and Produce Co.*, 343 N.L.R.B. No. 125 (2004).

Here, no cameras were even installed for the purpose of monitoring protected activity. The cameras in Northeast Center are security cameras that were put in place for the safety of Residents and employees prior to February 2019. T. 394. The cameras view the following: the front door; the rear entrance; the loading dock area; the two side entrances which are supposed to be locked. T. 394-95. They had nothing to do with surveillance.

THE POSTING DID NOT UNLAWFULLY BLAME THE UNION FOR A LACK OF RAISE

As an initial matter, there is no charge that the employer unlawfully failed to give a raise. The only charge is that the letter violates the act because it “blames the union” for the lack of a raise. The letter accurately states that Northeast Center believed there was an on-going union campaign, that several unfair labor practices had been filed, and that no raise could be given under those circumstances. Jt. Ex. 6. In this regard, while the petition had been withdrawn, Northeast had every reason to believe a new petition would be filed. The Board has considered pre-petition conduct when that conduct continues into the critical period. *See Redway Carriers, Inc.*, 274 N.L.R.B. 1359 (N.L.R.B. March 29, 1985) (finding the “critical period” began with the filing of the first petition even though it was withdrawn and a subsequent petition filed where there was on-going evidence of organizing such as claims of unfair labor practices), *cf. Carson Int'l, Inc.*, 259 N.L.R.B. 1073 (N.L.R.B. January 15, 1982) (finding no “critical period” where the break in time between the withdrawn petition and the new petition was 40 days and no objectionable conduct occurred during the period of time).

The letter is not an unfair labor practice, “blaming the union”. It was a truthful communication regarding factual circumstances that prevented the employer from making raises.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

HINMAN, HOWARD & KATTELL, LLP

/s/ Dawn J. Lanouette

Dawn J. Lanouette, Esq.

*Attorneys for NCRNC, LLC d/b/a Northeast
Center for Rehabilitation and Brain Injury*

80 Exchange Street, PO Box 5250

Binghamton, NY 13902-5250

(607) 231-6917

dlanouette@hhk.com

